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IN THE COURT OF APPEALS OF INDIANA

SUNDAY AYANGADE,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0710-CV-906
	)	
OLUWATOYIN AYANGADE,	)	
	)	
Appellee-Petitioner,	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David J. Dreyer, Judge
Cause Nos. 49D10-0603-DR-13257
49D10-0602-PO-4969

September 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Sunday Ayangade appeals the Marion Superior Court's (the "Dissolution Court") order granting his ex-wife, Oluwatoyin Ayangade, relief from judgment pursuant to Indiana Trial Rule 60(B)(3). On appeal, Sunday raises two issues, which we consolidate and restate as whether the Dissolution Court improperly granted Oluwatoyin relief from judgment. We affirm, concluding that because Oluwatoyin established she was entitled to relief from judgment as a matter of law, the Dissolution Court did not improperly grant her such relief.

Facts and Procedural History

On June 12, 1999, Oluwatoyin emigrated from Nigeria to the United States on a K-1 Visa as Sunday's fiancée. On July 9, 1999, the couple married in Marion County, and resided there for approximately the next six and one-half years. During that time, the couple welcomed two children, A.A., born in March 2000, and O.A., born in April 2002.

In December 2005, the couple traveled to Nigeria with their children to spend Christmas and New Year's with relatives. After arriving in Nigeria on December 14, 2005, the couple and their children stayed with Sunday's relatives for two days, during which time Sunday and Oluwatoyin agreed that she would visit her relatives, who lived in another town, and that Sunday and the children would eventually join her. Oluwatoyin left on December 16, 2005, but Sunday did not follow with the children. Instead, when Oluwatoyin returned around Christmastime, Sunday refused to let her see the children and served her with a petition for dissolution of marriage that had been filed in a Nigerian court (the "Nigerian

Statutory Court")[1] on December 28, 2005. Shortly thereafter, Sunday returned to Marion County with the children, leaving Oluwatoyin in Nigeria without her passport and other travel documents.

Over the next month, Oluwatoyin contacted the Nigerian police and the United States Embassy in Nigeria in an attempt to return to the United States. Also during this time, Oluwatoyin retained a Nigerian attorney, who filed an answer to Sunday's dissolution petition on February 2, 2006. Oluwatoyin eventually returned to the United States on February 5, 2006. Upon her return, Oluwatoyin was unable to locate Sunday and the children, but apparently received notice that on January 13, 2006, Sunday had filed a protective order petition against her in Marion Superior Court (the "Protective Order Court"). On February 6, 2006, Oluwatoyin responded by filing a protective order petition against Sunday, and the petitions were consolidated for a February 9, 2006, hearing. At the hearing, the Protective Order Court temporarily granted Oluwatoyin's petition until March 3, 2006, at which time it would hear additional evidence, and ordered that Oluwatoyin receive temporary parenting time with the children on alternating weekends beginning the weekend of February 10, 2006. Parenting time proceeded as scheduled for that weekend, but Oluwatoyin did not receive parenting time for the weekend of February 24, 2006. At the March 3, 2006, hearing, Sunday's counsel appeared without Sunday and without explanation as to his whereabouts.

[1] According to materials Sunday filed with the Dissolution Court, Nigerian marriages are governed by a tripartite system of laws referred to as "statutory," "customary," and "Islamic." Each of these legal systems has a corresponding court that, in the event of dissolution, assumes jurisdiction and adjudicates issues such as property division and custody of children. A couple may voluntarily choose which of the three systems will govern their marriage. For purposes of this case, the statutory and customary systems are relevant, and, according to the materials Sunday filed, the principal distinction between these systems is that the former does not permit polygamous marriages, while the latter does. See generally, Appellant's Appendix

Due to Sunday's absence, the Protective Order Court dismissed his petition without prejudice and, after hearing additional evidence on Oluwatoyin's petition, ordered that its February 9, 2006, temporary order remain in effect until March 3, 2008.

On March 27, 2006, Oluwatoyin filed a petition for dissolution of marriage with the Dissolution Court. On July 17, 2006, Sunday responded by filing a motion to dismiss, arguing that the petition failed to state a claim upon which relief could be granted because the parties' marriage was void and that the Dissolution Court should refuse to exercise jurisdiction because a Nigerian court (the "Nigerian Customary Court") had already dissolved the parties' marriage and resolved all issues relating to custody of the children.[2] To support his argument that the parties' marriage was void, Sunday attached a certified document from the Nigerian Customary Court dated December 19, 2005, stating that his marriage to a prior spouse "is hereby dissolved." Appellant's App. at 55. Sunday acknowledged that a Marion superior court had "purportedly" dissolved this marriage in March 1995, but claimed that because "only a customary court in Nigeria would be of competent jurisdiction to dissolve this marriage," it remained valid and thereby rendered Sunday's marriage to Oluwatoyin void as a matter of Indiana law. Id. at 40. To support his argument that the Dissolution Court should refuse to exercise jurisdiction, Sunday attached another certified document from the same Nigerian Customary Court dated March 1, 2006,

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at 44-45 (discussing Nigerian matrimonial law); Bolaji Owasanoye, The Regulation of Child Custody and Access in Nigeria, 39 FAM. L.Q. 405 (2005) (included in appellant's appendix at 66-90).

[2] At first glance, Sunday's arguments appear inconsistent because he argues his marriage to Oluwatoyin was void, but goes on to state that the Nigerian Customary Court nevertheless dissolved their marriage. These arguments are reconcilable at least to the extent that the materials Sunday filed with the Dissolution Court indicated, as a matter of Nigerian customary law, that Sunday was permitted to marry two wives and that only the Nigerian Customary Court could dissolve those marriages. See supra, note 1.

stating, among other things, that Sunday's marriage to Oluwatoyin "is hereby dissolved" and that Sunday has "the full custody of the children . . . ." Id. at 60. In his motion, Sunday also explained that his dissolution proceeding before the Nigerian Statutory Court was "unnecessary" because his "continued marriage . . . to the First Spouse rendered the purported statutory marriage between [himself] and [Oluwatoyin] legally void" as a matter of Nigerian statutory law. Id. at 41. To that end, Sunday attached a certified document from the Nigerian Statutory Court dated March 7, 2006, stating that Sunday "wishes to and hereby discontinue[s] this petition." Id. at 59. On November 20, 2006, the Dissolution Court accepted both of Sunday's arguments and dismissed Oluwatoyin's petition.

With her dissolution petition having been dismissed, Oluwatoyin refocused her efforts on locating the children, whom she had not seen since her parenting time on the weekend of February 10, 2006, by contacting the State Department and the National Center for Missing and Exploited Children. In August 2007, Oluwatoyin learned that O.A. had received dental services in Portage, Indiana, and filed several motions with the Dissolution Court, including a motion for relief from judgment on August 23, 2007. In her motion for relief from judgment, Oluwatoyin requested that the Dissolution Court reinstate her petition for dissolution of marriage because the documents supporting Sunday's motion to dismiss were fraudulent.[3] On August 27, 2007, the Dissolution Court conducted a preliminary hearing on Oluwatoyin's

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[3] Oluwatoyin disavowed that Sunday's counsel was complicit in Sunday's fraud. See id. at 127 (Oluwatoyin's motion for relief from judgment stating that "[u]ndersigned counsel by no means believes, or means to imply, or state directly that counsel for [Sunday] knew or believed the documents [Sunday] submitted were fraudulent. Undersigned counsel believes [Sunday] provided the documents to his counsel for submission to the Court"). Consistent with Oluwatoyin's position, our discussion below is not meant to imply any malfeasance on the part of Sunday's counsel.

motions. Sunday and Oluwatoyin attended the hearing with their respective counsel, and O.A. also was present. The Dissolution Court ordered that Oluwatoyin receive one hour of parenting time with O.A. on Wednesday evenings and scheduled an additional hearing for September 26, 2007, to assess parenting time and hear evidence on Oluwatoyin's motion for relief from judgment. Toward the close of the hearing, the Dissolution Court received assurances from Sunday and Oluwatoyin that they would attend the hearing and that they would not leave the country with O.A.:

> [Dissolution Court]: Why don't we try Wednesday afternoon at 1:30 on the 26th of September, okay. . . . Mr. Ayangade you will be here, correct? You will not leave the country or the State of Indiana?
> Mr. Ayangade: No, no sir.
> [Dissolution Court]: I'm telling you not to do that you promise me you won't correct?
> Mr. Ayangade: I will not.
> [Dissolution Court]: And you will – if necessary, you will be back for that hearing on the 26th?
> Mr. Ayangade: Yes sir.
> [Dissolution Court]: And Ms. Ayangade you also won't leave the country right?
> Mrs. Ayangade: No.
> [Dissolution Court]: And you won't leave the state and you'll be back here right?
> Mrs. Ayangade: Right.
> [Dissolution Court]: Okay, any questions either one of you?
> [Counsel for Oluwatoyin]: Yes. I would ask Judge that he be instructed not to allow the child to leave with anybody aside from him either.
> [Dissolution Court]: And the child will not leave as well correct?
> Mr. Ayangade: Yes sir.
> [Dissolution Court]: You will make sure the child remains in Indiana?
> Mr. Ayangade: Yes.
> [Dissolution Court]: In Indianapolis with you?
> Mr. Ayangade: Yes.
> [Dissolution Court]: Okay. So that's a promise you made to the court and we'll talk to you . . . September 26th.

Transcript at 52-53 (combined transcript of July 17, 2006; August 27, 2007; and September

26, 2007, hearings).

Despite his assurances, Sunday did not attend the September 26, 2007, hearing.[4] Nevertheless, the Dissolution Court continued with the hearing, admitting several documents into evidence and hearing testimony on Oluwatoyin's motion for relief from judgment. During the hearing, Oluwatoyin testified to the events described above, and added that she did not marry Sunday in Nigeria and that the first time she saw the certified documents from the Nigerian Customary Court was when Sunday included them in his July 17, 2006, motion to dismiss. On October 15, 2007, the Dissolution Court entered an order granting Oluwatoyin relief from judgment. The Dissolution Court's order also stated that its November 22, 2006, order dismissing Oluwatoyin's petition was vacated "due to mistake." Appellant's Brief at 27. Sunday now appeals.[5]

Discussion and Decision

Sunday argues the Dissolution Court improperly granted Oluwatoyin relief from judgment. A trial court's decision to grant a party relief from judgment is equitable in nature, and this court will not reverse unless there has been an abuse of discretion. Crafton v.

[4] At a subsequent hearing on October 26, 2007, Sunday's counsel agreed with the assessment of Oluwatoyin's counsel that Sunday left the country with O.A. the day before the September 26, 2007, hearing. See Transcript at 7-8 (October 26, 2007, hearing) ("[Counsel for Oluwatoyin]: . . . It is my understanding, Judge, that Mr. Ayangade as predicted left the country with [O.A.] the day before our hearing that we had on the 26th. [Dissolution Court]: Do you agree on that? Is that agreed? [Counsel for Sunday]: Judge I believe we have seen records that tend to confirm that.").

[5] After Sunday filed his notice of appeal, the Dissolution Court retained limited jurisdiction over Oluwatoyin's petition for the purpose of entering temporary custody orders. On October 26, 2007, the Dissolution Court conducted a hearing for that purpose, and, on November 13, 2007, entered an order granting Oluwatoyin sole physical and legal custody of the children in part because at some point between the September 26 and October 26, 2007, hearings, Sunday was arrested and placed in federal custody on charges of international child kidnapping. The record does not disclose the current status of Sunday's federal criminal proceedings, nor does it disclose the children's current whereabouts. At the time of its November 13, 2007, order, the Dissolution Court also was unaware of the children's whereabouts.

Gibson, 752 N.E.2d 78, 82-83 (Ind. Ct. App. 2001). Abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. Id. at 83.

Indiana Trial Rule 60(B) states in relevant part:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment . . . for the following reasons:
>
> . . .
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> . . . .

A party seeking relief under Trial Rule 60(B)(3) must show that 1) the adverse party committed fraud, misrepresentation, or misconduct; 2) the fraud, misrepresentation, or misconduct prevented the moving party from fully and fairly presenting its case at trial; and 3) the moving party has made a prima facie showing of a meritorious claim.[6] See Outback Steakhouse of Fla., Inc. v. Markley, 856 N.E.2d 65, 74 (Ind. 2006).

Sunday advances several reasons supporting his argument that the Dissolution Court improperly granted Oluwatoyin relief from judgment,[7] but we write initially to highlight

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[6] The moving party also must file the motion not more than one year after the entry of judgment, see Ind. Trial Rule 60(B)(8), but Sunday does not argue that Oluwatoyin failed to meet this requirement.

[7] One of Sunday's arguments is that the Dissolution Court improperly granted Oluwatoyin relief from judgment because her motion was merely an attempt to circumvent the appeal process. This court has stated consistently that Trial Rule 60(B) cannot be used as a substitute for a direct appeal or otherwise revive an expired appeal. See Ind. Ins. Co. v. Ins. Co. of N. Amer., 734 N.E.2d 276, 279 (Ind. Ct. App. 2000), trans. denied; Cullison v. Medley, 619 N.E.2d 937, 945 (Ind. Ct. App. 1993), trans. denied; see also William F. Harvey, 4 Indiana Practice 222 (3d ed. 2003) ("The general rule is that one must appeal a judgment within the time allowed and not sit idly by, letting the time to appeal expire, and thereafter filing a Rule 60(B) motion in an attempt to revive his remedy of appeal. . . . Relief is only properly provided under Rule 60(B) after a failure to perfect an appeal when there is some additional fact present justifying extraordinary relief which allows a trial court to invoke its equitable powers to do justice." (emphasis in original)). We note initially that our review of the record, specifically the September 26, 2007, hearing on Oluwatoyin's motion for relief

some confusion in interpreting the Dissolution Court's decision. The Dissolution Court based its dismissal of Oluwatoyin's petition on both of the arguments Sunday advanced in his motion to dismiss, namely, that the parties' marriage was void and that the Dissolution Court should refuse to exercise jurisdiction because the Nigerian Customary Court had already dissolved the parties' marriage and resolved all issues relating to custody of the children. Oluwatoyin argued she was entitled to relief from this dismissal because the documents supporting Sunday's motion were fraudulent. Although the Dissolution Court purported to grant Oluwatoyin relief from judgment for that reason, see appellant's br. at 27 (Dissolution Court's order stating that "[Oluwatoyin's] Motion to Set Aside under T.R. 60 is granted"), it went on to state that it was vacating its dismissal order on its own motion "due to mistake," id. The mistake to which the Dissolution Court refers is that at the time of the September 26, 2007, hearing, the Dissolution Court thought it had dismissed Oluwatoyin's petition based on a mistaken belief that the children were living in Nigeria when Oluwatoyin filed her petition. See Tr. at 153 (combined transcript of July 17, 2006; August 27, 2007; and September 26, 2007, hearings) (Dissolution Court, referring to its dismissal order, and stating that "if the children were here we would not have made such an order"); Appellant's Appendix at 164-65 (Dissolution Court's November 13, 2007, order stating that "there are issues of law and

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from judgment, indicates that Sunday never made this argument to the Dissolution Court and has therefore waived it. See GKC Ind. Theatres, Inc. v. Elk Retail Investors, LLC, 764 N.E.2d 647, 652 (Ind. Ct. App. 2002). Nevertheless, even if Sunday had made this argument to the Dissolution Court, Oluwatoyin's motion for relief from judgment indicates that the attorney Oluwatoyin retained to represent her after her petition had been dismissed learned of Sunday's fraud some time after the November 20, 2006, dismissal order. See Appellant's App. at 126 (Oluwatoyin's motion for relief from judgment stating her counsel learned that the documents Sunday submitted supporting his motion to dismiss may have been fraudulent based on information received from the Canadian Consulate, the State Department, and Oluwatoyin's attorney in Nigeria). Under such circumstances, we cannot say Oluwatoyin's motion for relief from judgment constitutes an attempt to circumvent the appeal process.

fact regarding the existence and validity of [the parties'] purported marriage or dissolution proceedings in Nigeria" and that "[o]n November 22, 2006, this Court dismissed this action under comity upon the mistaken belief that [Sunday] and the children of the marriage were residents of Nigeria"). The problem with this position is that the Dissolution Court never stated it was dismissing Oluwatoyin's petition because the children were living in Nigeria; as stated above, it dismissed the petition based on findings that "the marriage between [Oluwatoyin] and [Sunday] is void" and that the Nigerian Customary Court "has fully adjudicated the issues present[ed] by this dispute . . . ." Id. at 105-06. Thus, we are left with a situation where the Dissolution Court granted Oluwatoyin relief from judgment, but did so by ruling on the basis of a mistake that had nothing to do with its decision to dismiss her petition in the first place, resulting in the Dissolution Court reserving its judgment on Sunday's fraud – the very point Oluwatoyin advanced as the reason supporting her motion for relief from judgment.

In similar cases, this court has generally remanded with instructions that the trial court address the argument in the first instance. See Citizens Nat'l Bank of Grant County v. Harvey, 167 Ind. App. 582, 595, 339 N.E.2d 604, 611 (1976); cf. Parks v. Delaware County Dep't of Child Servs., 862 N.E.2d 1275, 1276 (Ind. Ct. App. 2007) (remanding to the trial court where trial court's findings "are insufficient and hinder an effective appellate review"). However, we decline to do so here because our review of the record convinces us that Oluwatoyin proved Sunday's conduct was fraudulent as a matter of law. To better understand Sunday's fraud, it is worth exploring the litigation he embarked upon in Nigeria during and after his December 2005 visit. As reflected in the documents supporting

Sunday's motion to dismiss, he apparently sought to dissolve his marriage to his former spouse by appearing before the Nigerian Customary Court on December 5, 2005,[8] see appellant's app. at 56, even though a Marion superior court had dissolved this marriage nearly ten years earlier, see id. at 40. The matter was continued until December 19, 2005, at which time the Nigerian Customary Court dissolved Sunday's marriage to his former spouse despite her absence at the proceeding. See Appellant's App. at 55.

On December 28, 2005, Sunday attempted to dissolve his marriage to Oluwatoyin by filing a petition with the Nigerian Statutory Court and affirming under oath, among other things, that he and Oluwatoyin resided in Nigeria after their marriage and were "ordinarily resident" there, that he was a "bachelor" at the time of his marriage to Oluwatoyin, and that Oluwatoyin absconded from the couple's residence in Nigeria with the children on December 4, 2005. See id. at 112-13. When Oluwatoyin denied these allegations and argued the Nigerian Statutory Court lacked jurisdiction, see id. at 120-27, Sunday appeared before the Nigerian Customary Court on March 1, 2006, and obtained an order dissolving his marriage to Oluwatoyin and granting him custody of the children,[9] see id. at 104, even though Oluwatoyin was in the United States at the time and did not receive notice of this proceeding, see tr. at 129 (combined transcript of July 17, 2006; August 27, 2007; and September 26,

[8] During the September 26, 2007, hearing on her motion for relief from judgment, Oluwatoyin testified and introduced documents into evidence establishing that she and Sunday did not arrive in Nigeria until December 14, 2005, nine days after Sunday's purported appearance before the Nigerian Customary Court. See Tr. at 96 (combined transcript of July 17, 2006; August 27, 2007; and September 26, 2007, hearings); Petitioner's Exhibit 7, at 2 (September 26, 2007, hearing).

[9] On April 7, 2006, having received custody of the children, Sunday filed affidavits with the Nigerian Statutory Court appointing his sister, who lived in Indianapolis, and his brother, who lived in Nigeria, as guardians of the children. See Appellee's App. at 149, 150. Sunday explained in his affidavits that he was appointing both his sister and brother as guardians because he traveled between the United States and Nigeria. See id.

2007, hearings). On March 7, 2006, having successfully dissolved his marriage through the Nigerian Customary Court, Sunday filed a motion with the Nigerian Statutory Court to discontinue his petition. Appellant's App. at 59. Sunday then used the documents from the Nigerian Customary Court proceedings to support his argument that the Dissolution Court should dismiss Oluwatoyin's petition. Sunday also supported his motion to dismiss with an affidavit stating that the children had resided in Nigeria since December 2005. This was not true, however, as Oluwatoyin presented evidence at the September 26, 2007, hearing that A.O. attended school in Indianapolis in January and February 2006. See Tr. at 89 (combined transcript of July 17, 2006; August 27, 2007; and September 26, 2007, hearings) (official from A.O.'s school testifying that she attended school for twenty-one days in January and February 2006).

The foregoing makes clear that Sunday was willing to make inconsistent representations to the Nigerian and American courts in an effort to both procure dissolution and custody on terms that were favorable to him and to resist Oluwatoyin's legitimate efforts to do the same. This court has stated consistently that relief from judgment pursuant to Trial Rule 60(B)(3) may be predicated on extrinsic fraud, which consists of fraud that prevents a trial of the issue in the case or improperly procures the exercise of the court's jurisdiction. See In re Paternity of B.N.C., 822 N.E.2d 616, 619 (Ind. Ct. App. 2005); Global Travel Agency, Inc. v. Metal Recovery Techs., Inc., 727 N.E.2d 1101, 1104 (Ind. Ct. App. 2000). Sunday's inconsistent representations not only prevented a final hearing on Oluwatoyin's petition, but also blocked the Dissolution Court from even exercising jurisdiction in the first place. As such, we are convinced that Oluwatoyin established she was entitled to relief from

judgment as a matter of law, and it therefore follows that the Dissolution Court's order granting her such relief was not improper.

Conclusion

The Dissolution Court's order granting Oluwatoyin relief from judgment pursuant to Trial Rule 60(B)(3) was not improper.

Affirmed.

BAKER, C.J., and RILEY, J., concur.